

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal No. 269 OF 2007

IN

Summons for Judgment No. 763 of 2007

in

Summary Suit No. 1491 of 1980.

1. Zafar Farooq Vohra, of Bombay
Indian Inhabitant residing at
Flat No.10, 3rd Floor, Asha Mahal
46B, Pedder Road, Bombay 400 026
2. Mazhar M. Vora, of Bombay
Indian Inhabitant having his office
at C/o. Zenith Rubber & Plastic
Works, Rangoonwala Building,
91 Mohamedali Road,
Bombay 400 003. ... Appellants

vs.

Yuvrani Hansadevi of Ajaygarh of Bombay
Indian Inhabitant residing at C/o H. H. Rajmata
of Bhavnagar, Somerset House, Off Pedder Road
Bombay 400 026. Respondent

Mr. E. P. Bharucha, Senior Advocate with
Mr. Zuben Kamdin i/b. Beri & Co., for appellants
Mr. Sunip Sen with Farhan Dubash i/b. Maneksha & Sethna for
respondent.

CORAM: R.M.S. KHANDEPARKAR
AND
D. G. KARNIK JJ.

DATE: April , 11, 2007

ORAL JUDGMENT : (Per R.M.S. KHANDEPARKAR J.)

1. Heard. Admit. Heard forthwith by consent.
2. This appeal has been filed challenging the order dated 21st February 2007 passed in Notice of Motion No. 763 of 2006. Learned counsel appearing for the appellants submitted that the impugned order is bad in law inasmuch as the respondent was not entitled to take out the Notice of Motion for restoration of the suit in view of the order passed by the learned Single Judge on 19th January 2006 whereby the application for restoration of the suit was rejected. The said order dated 19th January 2006 was passed in terms of Order 39 Rule 11 sub rule (2) as the earlier order dated 12th January 2006 was passed in exercise of power under Order 39 Rule 11 (1) of the Code of Civil Procedure. The order dated 19th January 2006 is an appellable order in terms of Order 42 Rule 1 clause (r) of the Code of Civil Procedure. Once an order in exercise of powers under Order 39 Rule 11 (2) and the same is not challenged by way of appeal, it attains finality and thereafter there could be no occasion for the respondent to take out Notice of Motion for

restoration of the suit and therefore the learned Single Judge could not have entertained Notice of Motion No. 763 of 2006.

3. A perusal of the impugned order discloses that the learned Single Judge in exercise of inherent power under section 151 of the Code of Civil Procedure has restored the suit by setting aside the order dated 19th January 2006 .

4. By order dated 12th January 2006 the learned Single Judge had directed the respondent / plaintiff to pay the costs for adjournment of the case with the further observation that the failure to pay the costs by 16th January 2006 would result in dismissal of the suit. Since the respondent / plaintiff failed to pay the costs within the stipulated period, the suit was deemed to have been dismissed on expiry of the said period. Thereafter on 19th January 2006 the respondent attempted to pay the costs which were ordered to be paid by order dated 12th January 2006. However, the court refused to allow the respondent to pay costs holding that the order dated 12th January 2006 was a self operative order, meaning thereby that the suit stood dismissed on 16th of January 2006 on account of the failure on the part of the respondent to pay

the costs in terms of the order dated 12th January 2006. Thereafter the present Notice of Motion no.763 of 2006 was taken out.

5. In support of the Notice of Motion, the affidavit filed by the respondent disclosed that the respondent at the relevant time was in Madhya Pradesh, besides that at the relevant time she was not well. It was also stated in the affidavit that the fact that the respondent was required to pay costs of Rs.10,000/- for the adjournment was not informed to the respondent by her advocate and therefore she was not aware of her obligation in that regard. The learned Single Judge believing the contention sought to be raised on behalf of the respondent, allowed the Notice of Motion and restored the suit.

6. The records nowhere disclose that the respondent had filed any application for restoration of the suit on 19th January 2006 or that the application or the request on behalf of the respondent which was rejected by order dated 19th January 2006 was in relation to the restoration of the suit. In fact the

order of 19th January 2006 merely states that the order dated 21.1.2006 was a self operative order. While the earlier order dated 12th January 2006 to the effect that “costs to be paid by Monday i.e. 16th of January, 2006 failing which suit shall stand dismissed”. At the same time, the impugned order clearly records that the respondents herein made an attempt to pay costs on 19th January 2006. It is not the case of the appellants that the appellants filed any affidavit before the learned Single Judge disputing this fact recorded in the impugned order. Being so it is to be concluded that the order of 19th January 2006 was merely in relation to the rejection of the request of the respondent for extension of time to pay costs in terms of order dated 12th January 2006, and not for restoration of suit in terms of the provision of law comprised under Order 39 Rule 11(2) of Code of Civil Procedure.

7. Order 39 Rule 11 of Code of Civil Procedure, as applicable in the State of Maharashtra reads as under:

“11. Procedure on parties defying orders of Court, and committing breach of undertaking

to the Court. - (1) Where the Court orders any party to a suit or proceeding to do or not to do a thing during the pendency of the suit or proceeding, or where any party to a suit or proceeding gives any undertaking to the Court to do or to refrain from doing a thing during the pendency of the suit or proceeding, and such party commits a breach of such undertaking, the Court may dismiss the suit or proceeding, if the default or contravention or breach is committed by the plaintiff or the applicant, or strike out the defences, if the default or contravention or breach is committed by the defendant or the opponent.

(2) The Court may, on sufficient cause being shown and on such terms and conditions as it may deem fit to impose, restore the suit or proceeding or may hear the party in defence, as the case may be, if the party that has been responsible for the default or contravention of breach as aforesaid makes amends for the default or contravention or breach to the satisfaction of the Court.

Provided that before passing any order under this sub-rule notice shall be given to the parties likely to be affected by the order to be

passed.”

8. Considering the provision of law comprised under Order 39 Rule 11 of Code of Civil Procedure and the order dated 12.1.2006 read with order dated 19.1.2006 it is clear that the order dated 19.1.2006 by no stretch of imagination can be said to be the order under sub rule (2) of Rule 11 quoted herein above. It merely reiterated the order dated 12.1.2006 and did not deal with the issue covered by the provision of said sub rule (2). In fact it is under the impugned order that the learned Single Judge proceeded to exercise the powers under the said sub rule (2).

9. The fact remains that the learned Single Judge in the impugned order taking into consideration the factual aspect of the matter, more particularly that the respondent was not personally aware of the fact that she was required to pay the costs by 16th January 2006 and that therefore the cost remained to be paid by that time, has allowed the Notice of Motion and has therefore restored the suit. We do not find any illegality committed while passing the impugned order

nor there is any breach of procedure. The records clearly disclosed that the plaintiff was not aware of the fact that the plaintiff was required to pay costs within particular time. Besides at the relevant time the plaintiff was not within the territorial jurisdiction of Mumbai or not even in the State of Maharashtra and there was no communication between the advocate for the plaintiff and the plaintiff herself. On account of failure on the part of the advocate to ensure that the plaintiff be made aware of her liability to pay costs, the plaintiff cannot be penalized by dismissing her suit. Merely on account of the delay in paying the costs, the plaintiff cannot be non-suited. It is pertinent to note that she has volunteered to pay the costs immediately after she came to know about the order directing her to pay the costs.

10. In the circumstances we do not find any justification to interfere with the impugned order except that the appellant should be compensated with further costs of Rs.10,000/- in addition to the one already ordered to be paid on 12th January 2006. We are informed that the costs of Rs.10,000/-

in terms of the order dated 12th January 2006 has already been paid by cheque. It has been clarified that though the cheque has been received the same has not yet been encashed by the appellants. The respondent shall pay Rs.10,000/- as further costs within 10 days to the appellants. With this modification in the impugned order, the appeal is disposed of.

(R.M.S. KHANDEPARKAR J.)

(D. G. KARNIK J.)